

**NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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NO. 05-1249

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STEPHEN SCHULZ,  
Appellant

v.

UNITED STATES OF AMERICA; UNITED STATES MARSHALS SERVICE;  
UNITED STATES CUSTOMS SERVICE, Property Seized from 56  
Summers Ave. West Long Branch NJ, Including \$15,000 in  
U.S. Currency and three cartons of personal items; 30,706  
Dutch Guilders from Account Number 359639216 in the name of  
J.L. Eskridge, Located at Rabo Bank

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On Appeal From the United States District Court  
For the District of New Jersey  
(D.C. Civ. No. 01-cv-04989)  
District Judge: Honorable Joseph H. Rodriguez

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Submitted Under Third Circuit LAR 34.1(a)  
SEPTEMBER 14, 2005

Before: VAN ANTWERPEN, GREENBERG AND NYGAARD, Circuit Judges.

(Filed: September 19, 2005)

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OPINION

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PER CURIAM

In 1995 Stephen Schulz and his brother David were arrested for conspiring to

possess cocaine with intent to distribute while on board a vessel on the high seas. Six years later, Schulz pled guilty to related charges and was sentenced to a term of imprisonment which he has since served. Meanwhile, the then-United States Customs Service searched the Schulzs' parents' residence, during which they seized \$15,000 in U.S. currency and three cartons of personal effects. The government also won a default judgment in a civil *in rem* action with regard to money seized in overseas accounts (c. \$25,000 in accounts belonging to J. Eskridge, one of Schulz's aliases, and c. \$12,000 in accounts belonging to an alleged co-conspirator, Richard Coleman) and a sailboat. United States v. Contents of any Accounts, Civ. No. 95-cv-03591 (D.N.J. February 11, 1997).

Schulz subsequently filed a complaint/motion for return of property, seeking the return of the \$15,000, the money in the overseas accounts, as well as damages for the loss of charter income from a sailboat (he does not seek the return of the boat which, the defendants allege, they did not seize because it has never been located).

The court dismissed the complaint with regard to the overseas accounts because Fed. R. Crim. P. 41(e) is not the appropriate vehicle for challenging a civil default judgment. Rather, Schulz should do so through Fed. R. Civ. P. 60(b). Relying on United States v. Bein, 214 F.3d 408, 412 (3d Cir. 2000), the court dismissed the complaint for damages related to the sailboat because it lacked jurisdiction to award money damages on a Rule 41(e) motion. However, the court did not dismiss the complaint with regard to the \$15,000 because there was an issue of fact concerning the adequacy of the notice

provided to Schulz. In response to Schulz's motion for reconsideration, the court agreed that two of the overseas accounts were not subject to the earlier civil action. However, Schulz could seek their return via Rule 41(e) because the accounts were seized by the Dutch government without a specific request by the United States and Schulz did not even allege that the proceeds from the accounts had been transferred to the United States.

When Schulz renewed his motion for return of the \$15,000, the District Court granted the defendants' motion to dismiss for lack of standing, finding that Schulz provided no evidence that he had an ownership interest in the seized property. Rather, the evidence indicated that the \$15,000 is in fact his brother David's.

This appeal followed. We have jurisdiction under 28 U.S.C. § 1291.<sup>1</sup> We exercise plenary review of standing, but review for clear error the factual elements underlying the District Court's determination of standing. General Instrument Corp. v. Nu-Tek Electronics & Mfg., Inc., 197 F.3d 83, 86 (3d Cir.1999). Our review of the District Court's conclusion that it lacked jurisdiction to award damages under Fed. R. Crim. P. 41(e) is plenary, United States v. Government of Virgin Islands, 363 F.3d 276 (3d Cir.

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<sup>1</sup> The appellees urge us to dismiss the appeal for lack of jurisdiction because the notice of appeal was filed a day late. However, the District Court did not comply with the separate judgment rule set forth in Fed. R. Civ. P. 58(a). See Local Union No. 1992 of Intern. Broth. of Elec. Workers v. Okonite Co., 358 F.3d 278 (3d Cir. 2004). As a result, the judgment was not entered until 150 days after the court's decision was entered on the docket, Fed. R. Civ. P. 58(b)(2)(B). Thus, Schulz's appeal was timely filed and to the extent that the appellees' brief includes a motion to dismiss the appeal for lack of jurisdiction, we deny it.

2004), as, because it is also a purely legal question, is our review of the question whether Schulz should challenge the seizure of the overseas accounts which were subject to the civil *in rem* action under Fed. R. Civ. P. 60(b) instead of Rule 41(e). We review the District Court's ruling concerning the remaining two overseas accounts for abuse of discretion. United States v. Chambers, 192 F.3d 374 (3d Cir. 1999).

## I

After thorough review of the record we agree with the District Court's reasons for dismissing Schulz's complaint and motion for return of property. Schulz devotes much of his brief to discussing the seizure of his overseas accounts. However, we agree with the District Court that the proper avenue for seeking redress with regard to the accounts involved in the civil *in rem* action is a Rule 60(b) motion in 95-cv-03591, not the instant Rule 41(e) proceedings. We will not address the arguments he presents on appeal concerning the custody and control of the other two overseas accounts because he did not present them in the District Court. Rather, as the District Court found, he conceded there that the accounts had not been transferred to the United States. In light of that concession (which he seeks to avoid on appeal by referring to his "remark [as] perhaps inartfully drafted," reply br. at 10) he can hardly argue now that the District Court abused its discretion in concluding that it could not order the United States to return the contents of those accounts.

Schulz also argues at length that the government's evidence that David's was the

sole interest in the \$15,000 is deficient and that the government had evidence that he too had an interest in it. However, as the District Court concluded, Schulz provided no evidence in the District Court that he had an interest in the \$15,000. Indeed, as Schulz admits, his only response to the government's motion to dismiss for lack of standing was to assert that the government's evidence was "unreliable," that the government had not "conclusively" shown that the money was David's, and that the government had previously asserted that the money belonged to both of them. Moreover, these assertions were no more than conclusory. See letter brief filed July 7, 2004. Schulz's contention that he provided no evidence of ownership because the District Court did not ask for any borders on the disingenuous; we note that he did not seek reconsideration of the District Court's decision in that (or any other) regard. Based on the evidence before it, the District Court's conclusion was plainly correct.

## II

Schulz's notice of appeal is styled in addition as a mandamus petition in which he seeks an order directing the District Court to address a motion to vacate which he claims to have filed in the civil *in rem* action. However, earlier this year he filed a similar combination notice of appeal and mandamus petition in that case as well. We dismissed the appeal as untimely and denied the mandamus petition as follows:

[Schulz] also requests unspecified mandamus relief. To the extent that he is requesting that we order the District Court to act on his Rule 60(b) motion, we note that no such motion has been docketed in the District Court. Schulz has not shown that he filed such a motion. He has not submitted a copy of the Rule 60(b)

motion he claims to have filed. While he has submitted certificates of mailing indicating that he mailed something to the appellees and the District Court on June 1, 2004, we note that he filed a Rule 41(e) motion in his other District Court case on June 3, 2004. Accordingly, Schulz's petition for mandamus is denied. . . .

United States v. Contents of Any Accounts, C.A. No. 05-1297 (3d Cir. April 6, 2005).

The District Court's docket still does not show that Schulz ever filed such a motion, and he has not demonstrated that he did. Thus, we will affirm the District Court and, to the extent that Schulz's notice of appeal is also a mandamus petition, the petition is denied.